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16
17 IN THE SUPREME COURT
18 STATE OF ARIZONA

19 PETITION TO AMEND RULE 31(d),
20 ARIZONA RULES OF THE SUPREME
21 COURT

22 Supreme Court No. R- _____
23 Petition to Amend Rule 31(d), Arizona Rules
24 of the Supreme Court

25
26 The Court is petitioned, pursuant to Rule 28, Ariz. R. Sup. Ct., to add an exemption to Rule 31(d), Ariz. R. Sup. Ct., to allow an authorized agent of a planned community association or a condominium unit owners' association (collectively referred to as "Associations"), to prepare, execute, and record liens on behalf of Associations; to communicate with homeowners and condominium unit owners about unpaid assessments and fees; and to represent Associations in procedures before the small claims division of Arizona's justice courts. The specific language of the proposed amendment is set forth in Appendix "A" attached hereto.

1 **Background and Purpose of the Proposed New Rule.**

2 As described below, a majority of Associations are managed by professional
3 community management companies. Rule 31 has been interpreted to preclude
4 community management companies – the entities most involved in and
5 knowledgeable about the Associations’ day-to-day operations – from taking certain
6 actions to assist with the collection of assessments and fees, duties that are incidental
7 to the regular course of managing Associations. As a result, Associations must pay
8 attorneys to assist with pursuing assessments and fees, which can double and even
9 triple the cost to Associations. Associations have the statutory and contractual right to
10 assess delinquent owners for the Associations’ attorneys’ fees and costs, but in many
11 cases these owners simply cannot pay the fees. As such, Associations must pass on
12 their attorneys’ fees to their members in the form of increased dues. This rule change
13 seeks to allow an authorized agent of a community management company to contract
14 to perform tasks incidental to overall association management, such as preparing,
15 executing, and recording liens; communicating with homeowners and unit owners
16 regarding past due assessments; and representing Associations in small claims court
17 procedures.

18 Planned community associations and condominium unit owners’ associations
19 are private organizations created and governed by the planned community’s or
20 condominium’s “declarations,” or governing documents. *See* A.R.S. §33-1202,
21 -1241, and -1802. As of July 2007, Arizona had more than 8,900 community
22 associations covering more than 1.2 million Arizona homes. *See* 2007-2008 Arizona
23 Community Management Impact Study (hereafter “Impact Study”), at 4.
24 Associations play many of the same roles as municipal governments, including
25 providing maintenance, levying assessments, establishing rules, and imposing fines.

1 By statute, Associations have liens on units and homes for assessments levied against
2 the units and homes, which are perfected upon recording of the Associations'
3 declarations. *See* A.R.S. §§ 33-1256 and -1807.

4 Associations are governed by volunteer boards of directors, typically elected
5 among the homeowners or unit owners at an annual meeting, who appoint corporate
6 officers, establish committees, and oversee the finances of the corporation. *See*
7 Impact Study at 3. Board members regularly delegate the Associations' day-to-day
8 operations to community management companies. *Id.* Two-thirds of Arizona's
9 Associations contract with individual community managers or professional
10 community management companies. *Id.* at 7. The contracted community
11 management company is responsible for oversight of maintenance of common areas,
12 management of budgets, collection of assessments, homeowner communications, and
13 enforcement of the CC&Rs and other governing documents. *Id.* at 3.

14 In the course of collecting assessments, Associations regularly prepare,
15 execute, and record notices of the statutorily-created liens for unpaid assessments and
16 fees to put third parties on notice of the liens and to ensure that they are paid. The
17 preparation, execution, and recordation of these liens are incidental to the regular
18 course of the Associations' business. Nevertheless, various administrative bodies
19 have found that a community management company's execution of a lien on an
20 association's behalf constitutes the unauthorized practice of law. As such,
21 Associations must either ask volunteer board members to sign the liens (most of
22 whom are reluctant to execute liens against their neighbors), or pay attorneys to
23 execute liens prepared from information gathered and maintained by the community
24 management companies. The proposed rule change would allow community
25 management companies, acting on the first-hand knowledge that they possess about
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1 assessments and fees in their role as contracted managers of Associations, to prepare,
2 execute, and record notices of liens for unpaid assessments and fees.

3 In addition, the proposed rule change would allow a duly authorized
4 representative to represent Associations in small claims procedures. A person who is
5 not an active member of the bar already may represent a corporation in small claims
6 procedures, so long as such a person is “a full-time officer or authorized full-time
7 employee of the corporation who is not charging a fee for the representation.” See
8 Ariz. R. Sup. Ct. 31(d)(7). Most Associations, however, have neither full-time
9 officers nor full-time employees. Rule 31, as currently written, would require a
10 volunteer board member with very little knowledge of an association’s day-to-day
11 operations or the delinquent owner’s account (and who may be the owner’s neighbor
12 and therefore reluctant to be adverse to their neighbors), to sign complaints and
13 appear in small claims court on the association’s behalf.

14 Arizona would not be alone if it allowed Associations to be represented in
15 small claims procedures by authorized agents, in addition to full-time officers or full-
16 time employees. California, which also restricts participation in small claims court to
17 individual plaintiffs and defendants, has adopted an exception that allows an
18 association that manages a “common interest development” to “appear and participate
19 in small claims actions through an agent, a management company representative, or
20 bookkeeper who appears on behalf of that association.” See Cal. Code. Civ. P. §
21 116.540(i).

22 The proposed rule change benefits Arizona’s homeowners and unit owners in a
23 number of respects. First, it saves association members money by allowing
24 Associations to contract with authorized agents to carry out tasks that are incidental to
25 their management duties. Second, it reduces the legal costs charged against
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1 financially-distressed owners who owe Associations past due assessments and fees.
2 Third, it allows Associations to be represented by the individuals with first-hand
3 knowledge about the assessments and fees. Finally, it allows Associations to allocate
4 more of their limited resources to the protection of property values and community
5 upkeep, a critical function in today's economic market.

6 For the reasons set forth above, the Arizona Association of Community
7 Managers, the Home Builders Association of Central Arizona, and AAM, LLC
8 respectfully petition this Court to amend Rule 31(d) of the Arizona Rules of the
9 Supreme Court, as set forth in Appendix "A" attached hereto.

10 RESPECTFULLY SUBMITTED this 30th day of December, 2010.

11 Polsinelli Shughart PC

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24 Additional Signatures and Certificate of Service on Following Pages.
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1 I, Linda Lang, am CEO and Executive Director of the Arizona Association of
2 Community Managers (AACM). AACM joins in the Petition to Amend Rule 31(d),
3 for the reasons outlined in the petition.

4 RESPECTFULLY SUBMITTED this 22 day of December, 2010.


5 ARIZONA ASSOCIATION OF ASSET
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1 I, Connie Wilhelm, am President of the Home Builders Association of Central
2 Arizona (HBACA). HBACA joins in the Petition to Amend Rule 31(d), for the
3 reasons outlined in the petition.

4 RESPECTFULLY SUBMITTED this 22 day of December, 2010.

5 HOME BUILDERS ASSOCIATION OF
6 CENTRAL ARIZONA

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1 **Electronic copy filed with the**
2 **Clerk of the Supreme Court of Arizona**
3 **this 30th day of December, 2010.**

4 By: /s/Kelly Dourlein
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APPENDIX A

DRAFT OF THE PROPOSED AMENDED RULE

Rule 31. Regulation of the Practice of law

[No change in existing text. The following language would be an addition of another exemption.]

(d) Exemptions

30. A condominium unit owners' association, as defined in A.R.S. § 33-1241, and a planned community association, as defined in A.R.S. § 33-1802, may be represented in small claims procedures, in communicating with condominium unit owners and homeowners regarding unpaid assessments and fees, and in the preparation, execution, and recordation of notices of liens created pursuant to A.R.S. § 33-1256 and § 33-1807, by a duly authorized corporate officer, board member, employee of the association, or employee of a management company with a contract to provide management services to the association who is not an active member of the state bar.